UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES NEW YORK OFFICE

MEDICAL DIAGNOSTIC LABORATORIES,
GENESIS

and Case 22-CA-250467

DISTRICT 119J, NATIONAL UNION OF
HOSPITAL & HEALTHCARE EMPLOYEES,
AFSCME, AFL-CIO

Henry Powell, Esq.,
for the General Counsel.
Daniel S. Sweetser, Esq., of Lawrence, New Jersey,
for the Respondent.
Arnold S. Cohen, Esq., of Newark, New Jersey,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried remotely in a video hearing on January 20, and 21, 2021, pursuant to a complaint issued by Region 22 of the National Labor Relations Board (NLRB) on January 27, 2020.

The complaint alleges that on about October 11, 2019,[1] Medical Diagnostic Laboratories, Genesis (Respondent) terminated employee Miguel D. Hernandez because he formed, joined, and assisted the union and engaged in concerted activities, and to discourage employees from engaging in these activities (GC Exh. 1, pars. 7 and 8).[2] The complaint alleges that by this termination, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (Act). The Respondent filed a timely answer denying the material allegations in the complaint (GC Exh. 1).

On the entire record, including my assessment of the witnesses' credibility[3] and my

[1] All dates are in 2019 unless otherwise noted.

[2] The exhibits for the General Counsel are identified as "GC Exh." and the Respondent's exhibits are identified as "R. Exh." The posthearing brief of the General Counsel is identified as "GC Br." and the Respondent as "R. Br." The hearing transcript is referenced as "Tr."

[3] Witnesses testifying at the hearing included Miguel D. Hernandez, Sonia Martinez, Brianna Reed, Alyssa Westfall, Kelly Winchester, and Stephanie Berry.

observations of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the brief filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent, a domestic corporation, with an office and place of business located at 2439 Kuser Road, Hamilton, New Jersey, is engaged in the operation of a medical testing laboratory. During the preceding 12 months, the Respondent purchased and received at its Hamilton, New Jersey facility, goods and supplies valued in excess of $50,000 directly from points outside the State of New Jersey (GC Exh. 1 pars. 3 and 4). The Respondent admits to pars. 2 and 3 in its answer to the complaint (GC Exh. 1(f)). As such, I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4] The District 1199J, National Union of Hospital & Healthcare Employees, AFSCME, AFL–CIO (Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

a. The employment of Miguel D. Hernandez

Miguel D. Hernandez (Hernandez) was previously employed as a lab technician at the Respondent's Hamilton facility. As a lab technician, Hernandez was responsible for examining urine and blood specimens received from physicians for presence of pathogenic and diseases (Jt. Exh. 10). Hernandez was employed by the Respondent in 2017 and 2018. He voluntarily resigned in 2018 but was rehired in late 2019 to the same position (R. Exh. 15). Hernandez' work shift was Friday, Saturday, and Sunday from 11 a.m. to 11 p.m. Hernandez was disciplined in November 2018 shortly after he was rehired. Hernandez was given a reprimand for insubordination for refusing to accept an assignment from a supervisor. Hernandez had not been previously disciplined by the Respondent (Tr. 36–38). The reprimand was prepared by Supervisor Amanda Pavuk (R. Exh. 7) and stated the following:

> On December 1, 2018, Miguel Hernandez was scheduled to be in Thin Prep in the clinical lab. When he came in a t 11:00AM, he told one of the lab coordinators that he was switching spots with another lab tech in PCR. At around 9:00PM, Miguel was asked by a lab coordinator to do a partial Thin Prep. When asked to do so, Miguel said that he would "rather not" and did not complete the task.
>
> According to GBG policy, The Company has established general guidelines to govern the conduct of its employees. Examples of behavior and conduct that the Company considers inappropriate and which could lead to disciplinary action up to and including termination include: Demonstrating insubordination. In addition, it is also the responsibility of the

[4] The Respondent subsequently stipulated on the hearing record that it is an employer as defined under the Act (Jt. Exh. 2).

employee to perform their duties to the best of their ability and to the standards as set forth in their job description or as otherwise established.

Hernandez disputed his discipline contending that he was not ordered to perform the assignment but was merely requested to do so by his supervisor. He testified that a lab coordinator[5] was passing his workstation and asked, "how I would feel about performing an extraction." Hernandez replied that he rather not because he was the only person at his workstation. Hernandez was informed by a representative from the Human Resources (HR) department of his insubordination and that the request was viewed by management as a direct order to perform the extraction (Tr. 37–40). Hernandez testified that he subsequently discovered that his reprimand would affect his opportunity for a promotion, and he would be ineligible for a wage increase for 1 year. He requested a meeting with HR Representative Alyssa Westfall[6] (Westfall) in January 2019 regarding the consequences of his discipline (Tr. 41, 42).

Hernandez complained to Westfall that his reprimand was a very minor offense when compared to more egregious conduct occurring in the lab area, such as safety violations, unprofessionalism, and derogatory comments. Hernandez testified that Westfall seemed receptive to his concerns and promised that she would get back to him to resolve the discipline. Hernandez also testified that Westfall allegedly thank him for the reported safety violations and would also look into his concerns.

Hernandez repined to Westfall that there was no investigation conducted on his reprimand but instead, he became the subject of an investigation over his relationship with Brittany Mucha, who was a supervisor in the lab at the time. Hernandez testified there was an investigation regarding several employee complaints over favoritism shown by Mucha towards Hernandez and with him spending work time with Mucha. The complaints were consolidated in an email from Louis Kopack (Kopack) to Westfall and Amanda Pavuk on December 4, 2018. One complaint centered over Kopack's request on December 1, 2018 for Hernandez to perform an assignment which Hernandez refused, which resulted in his reprimand for insubordination. Kopeck stated in his summary report attached to his email that Hernandez spent the entire time with Brittany (Mucha) when he told Kopeck that "I'd rather not" do the extraction (Tr. 42-44; Jt. Exh. 1; R. Exh. 6). Obviously, Hernandez denied these allegations at the Westfall meeting.

Hernandez testified that nothing positive resulted of his meeting with Westfall. He stated that in a subsequent meeting with Westfall and Peter Winchester[7] in February, he was informed that Respondent was dismissing his discipline grievance. It was explained to Hernandez that the request to perform the extraction ("How do you feel like performing the extraction?") was a subtle attempt at a direct order to perform the extraction and his refusal ("I rather not.") was insubordination (Tr. 38).

As a consequence of his discipline, Hernandez stated that he would not be permitted to apply for any promotions or be eligible for any raises for 1 year from the date of his reprimand.

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[5] The supervisor was identified as Louis Kopack, who was the lab coordinator at the time.

[6] Alyssa Westfall was the Respondent's HR manager at the time.

[7] Peter Winchester was Respondent's director of the laboratory at the time and was mistakenly referred as the vice-president. Kelly Winchester was the vice-president of lab operations at the time.

In January, his promotion was denied. Hernandez was upset and complained that this policy was not written in any employer handbook. Hernandez also maintained that despite his reprimand, he performed excellent work and his discipline should not adversely impact on his career. He testified that he sought out his supervisors in March, April, and May and spoke to them about his performance. Hernandez spoke to Supervisors Kopack, Brianna Squilla, and Chelsea Johnson, among others.[8] He stated that all of them gave him "glowing reviews" about his performance. The evaluation meetings with his supervisors were initiated by Hernandez. They were not formal performance reviews and there was no documentation of the review by the employer. Hernandez did not record any of his meetings with the supervisors (Tr. 39–41, 45–48).

Apparently dissatisfied with his reprimand for insubordination, Hernandez continued to complain to various human resources personnel. Hernandez recalled a meeting with Lisa Totin (Totin)[9] and Stephanie Berry (Berry),[10] in addition to another meeting with Westfall and Peter Winchester. Hernandez testified that he had audio recorded these meetings. Hernandez stated that he was informed that discipline will not be dismissed (Tr. 44, 45). In his follow up meeting with Winchester on March 1, Hernandez was introduced to Brianna Reed, who was the human resources liaison to the laboratory at the time.[11] Hernandez was again informed that his reprimand would stand. The audio recording did not identify who was speaking, but the female voice confirmed to Hernandez that he would not be eligible for any annual increase or promotions through the end of 2019 (R. Exh. 19B).

Hernandez recalled meeting with Totin and Berry either in April or May.[12] Hernandez made an audio recording of this meeting (Tr. 51; R. Exh. 20B). Hernandez did not recall when this meeting took place. Hernandez again complained about deserving a reprimand and all the good work he is performing in the lab. Hernandez also pointed out to the HR officials of various coworkers standing around and not working while also violating various laboratory safety protocols. Hernandez was told in no uncertain terms that he should report the violations to his supervisors. Hernandez admitted in testimony that he never reported safety issues and conduct of his coworkers to a supervisor (Tr. 57).

With regards to Totin, Hernandez testified that he sought out a meeting with her because as the benefits specialist, Totin was responsible for rescheduling employees' work shifts depending on various personal circumstances. As noted above, Hernandez worked a compressed schedule from Friday through Sunday. Hernandez' request was to work from Saturday through Monday. Hernandez testified that he had applied (he did not recall when, but indicated it was in June), for a change of work schedule to accommodate his school hours and for a reasonable accommodation under the Americans with Disabilities Act due to a stress-related condition. Hernandez believed he had made his accommodation request on about June 20. The actual date

[8] Hernandez also tried to meet with Assistant Lab Managers Bhavina Patel and Rachel Stanford but was unsuccessful (Tr. 49).

[9] Lisa Totin was the HR benefits specialist at the time.

[10] Stephanie Berry was the director of human resources at the time.

[11] Reed testified she was the HR representative/HRAS specialist at the time (Tr. 200).

[12] The recorded meeting occurred on April 12.

of the request was at meeting with Totin on June 14 (GC Exh. 5B). This meeting was recorded by Hernandez and 2 other HR personnel were present but not identified in the audio recording. Hernandez was informed that his hours on Friday can be shorten but it would be a burden on the employer to provide him with a schedule change to Monday because the lab did not receive samples to test on Mondays (GC Exh. 5B at 5–8). Hernandez also related his second reason for his request for a schedule change was so that he would not be working alongside Tyler Rogers, who had had accused of causing him ". . . a lot of stress." (GC Exh. 5B at 6). The unidentified person from the HR office suggested that Hernandez could work a Tuesday through Thursday schedule, which he turned down because of his evening school classes.

Hernandez was on leave through the summer months and did not return to work until September. On September 6, Hernandez send an email to Totin as a follow up to his accommodation request. Totin informed Hernandez on September 23 that there is no need for additional lab technicians on Monday because there is less work for them and that the scheduling change would still overlap with the work schedule of Rogers, who Hernandez was trying to avoid (R. Exh. 14). This was confirmed by Kelly Winchester, the vice-president of laboratory operations, in her email sent to Totin on the same date (Jt. Exh. 3).

Hernandez specifically recall that he had a follow-up meeting with Totin on September 27. Brianna Reed also attended the September 27 meeting. Hernandez wanted to know why his accommodation request was being denied and was informed that it was due to financial reasons not justifying another lab technician on a Monday schedule. Hernandez said he recorded his meeting with Totin[13] (Tr. 48; R. Exh. 21B). Totin also informed Hernandez that he had never provided any medical notes, a letter or certificate from his physician to justify the medical need for his accommodation. Hernandez testified that he had provided medical proof to the Respondent. Totin denied that any medical substantiation for the accommodation was received from Hernandez and no such document from Hernandez' physician was proffered at any time through the date of this hearing. They also discussed Hernandez' continuing complaints about safety violations in the lab and the failure of the HR office to take any discipline against other employees engaged in unsafe work practices (Tr. 49–51).

b. Meeting with the union

Hernandez testified that he was upset that nothing positive came from the September 27 meeting. He sought advice from his father, who was a former union member. His father suggested that a union may be helpful in organizing the Respondent's employees. Hernandez contacted union Local 119J on about September 19 and his call was referred to Sonia Martinez (Martinez). Martinez testified that she contacted Hernandez on about September 24 and he returned her voicemail on September 27. At the time, Martinez was the Local 119J lead organizer (Tr 25–27). Hernandez discussed his situation with Martinez and inquired as to how to organize the lab workers. They continued to discuss this topic on a second phone call on September 30. It happened that the union was having a conference and Hernandez decided to

[13] The audio recording had Totin telling Hernandez that moving him to a Monday schedule was a financial burden on the company since it would add another technician for that day, which was a historically slow day because blood samples are not done by physicians and medical clinics on weekends. Hernandez was again offered other shift days as an accommodation (R. Exh. 21B at 22–25).

attend the conference and met Martinez on October 8 and 9. At the conference, Martinez provided Hernandez with union brochures and pamphlets and explained how Hernandez needed to talk with the lab workers and to assess their interest in forming a union (Tr. 28, 29).

Martinez testified that she was not involved in the survey to assess the workers' interest in organizing. She stated that she received a phone call from Hernandez on October 11 and was informed by Hernandez that he had been terminated on that date (Tr. 30).

c. The discharge of Hernandez

On October 11, Hernandez sent an email to Reed at 1:33 p.m. (Jt. Exh 1; R. Exh. 5). Hernandez stated that he was aware that an employee was recently terminated, who had worked on the Monday shift. Hernandez stated that this would be a good opportunity to move him to a Monday schedule. Hernandez also complained about Rogers and reported that Rogers was not working but was sports betting with another coworker. Hernandez did not identify the coworker and only complained about Rogers. Hernandez also complained in the email to Reed that Rogers was not working with his lab gloves and was flirting with another coworker. He stated that Rogers' behavior was "incredibly disheartening" and mentioned other workers not following safety protocols by wearing a lab coat or gloves. Hernandez ended his email by stating

> I will continue to monitor troublesome activity in the lab, and I hope properly disciplinary action will be taken to correct this pattern of behavior so that all employees can be held to the same standard regardless of standing.

Hernandez testified that he did not speak to any coworkers about union organizing the lab until after he had sent out his email. His email was sent at 1:33 p.m. Hernandez insisted that he spoke to his coworkers about the union only during his lunch period. He believed his lunch break was at 4 p.m. On cross-examination, Hernandez corrected himself and believed he may have spoken to his coworkers prior to 1:33 p.m. and before he had taken his lunch break but was not certain ("I don't know for sure.") (Tr. 119–120).

Reed testified that the decision to terminate Hernandez was made before 2:15 p.m. on October 11 after receiving his email. Reed testified that the October 11 email was the "last straw" and despite informing Hernandez on numerous occasions as to why he could not transfer to a Monday shift, Hernandez continued to request that shift. Reed also stated that Hernandez continued to make complaints about other lab workers and insisted on bringing his reports about alleged safety violations and misconduct of the lab workers to HR personnel rather than to report the violations to his superiors when they were actually observed by him. Reed states that Hernandez' insistence to "continue to monitor troublesome activity in the lab . . ." was being disruptive after he had been told to bring the safety violations to the attention of his supervisors.

Reed testified that she went to see Alyssa Westfall (Westfall), who happened to be at work on October 11 and was in an office across from Reed. Reed did not bring a copy of the email with her and had not forwarded the email to Westfall before meeting with her.[14] Reed believed she met with Westfall shortly after the time the email was sent (1:33 p.m.) and before

[14] Reed forward the email to Westfall at 4:14 p.m. on October 11 (Jt. Exh. 5).

Reed left the building to attend a business function at approximately 2:15 p.m. Reed asked Westfall to come over to her office and view the email on Reed's computer. Reed testified that she met with Westfall for about 5 minutes and then they went to meet with Berry (Tr. 205, 206). Reed then left Westfall and Berry to attend a business function at approximately 2:15 p.m. after the decision to terminate Hernandez was made (Tr. 239, 240).

Reed testified that Hernandez was discharged due to Respondent's "loss of trust" in him as an employee. Reed explained that the factors used in the consideration of a "loss of trust" were Hernandez not maintaining the parameters of his job duties; constantly reporting alleged safety violations and misconduct of his coworkers rather than to report them to the supervisors; his constant request for a Monday shift when he was already informed that the amount of work on Monday did not justify an additional employee; continuing to complain about Tyler Rogers, which was not justified. Reed noted that Hernandez wanted a Monday shift because Rogers was "stressing him out" and that the request was for an accommodation due to this disability. Reed noted that Hernandez had never provided a doctor's note for the accommodation and that Rogers actually worked on a Monday shift (Tr. 227–231).

Alyessa Westfall (Westfall) testified that she is and was the HR manager in October and reports to Stephanie Berry, the HR director (Tr. 269). Westfall stated that she and Berry made the joint decision to discharge Hernandez after receiving the information from Reed regarding the October 11 email from Hernandez (Tr. 270). Westfall testified that she read the email on Reed's computer when she went to see Reed in her office after Reed informed her of the email (Tr. 270–273). Westfall could not recall if Reed was present in the office when she discussed Hernandez with Berry.

Westfall and Berry jointly decided to terminate Hernandez' employment because of the company's loss of trust in him as an employee. Westfall testified that Hernandez was disruptive and not ". . . working towards the goals of the company." Westfall testified she was aware of Hernandez' constant complaints and his insistence on continuing to complain as early as their April meeting. Westfall stated that she was also involved in Hernandez' continued request to change to a Monday shift, although he was already informed as early as February that for business reasons, his request could not be accommodated. Westfall further stated that Hernandez was the subject of a sexual harassment complaint and on that basis, he would have been discharged. Westfall admitted that the harassment complaint had not been fully investigated at the time his email was sent on October 11 (Tr. 282–285).

Stephanie Berry (Berry) testified that she is and has been the HR director since 2019 (Tr. 336). Berry spoke to Westfall and Reed on October 11 about Hernandez' email. Berry testified that Reed and Westfall came into her office regarding the contents of the October 11 email. Berry testified that she was not shown the email at this time. Berry summarized the factors for Hernandez' discharge. Berry testified that they believed Hernandez would not be focusing on his job while he continues to monitor the other employees for safety violations as he noted in the email. Berry also stated that Hernandez continued to criticize Tyler Rogers even though there was nothing to substantiate the criticisms and in his repeated request to work on Mondays to avoid Rogers. Finally, Berry cited Hernandez' continued attempts to overturn his reprimand (Tr. 342–347).

Berry testified that factors considered for discharging Hernandez were his continued complaints about his reprimand even though he was affirmatively told at their June meeting that there be no expungement of his reprimand; his continued complaints about safety violations in the lab; his complaints about Rogers; and his continued insistence for a Monday work shift. Berry stated that these factors amounted to a "loss of trust" in Hernandez not working in the best interest of the company. Berry explained loss of trust as meaning (Tr. 354)

> So it encompasses a lot of different things. It's primarily for a person that is just not doing what's in the best interest of the company. They're not putting the company first, they're taking away company time, they're not focusing on their job and [not] really focusing on the responsibilities of their duties.

Reed stated that she prepared Hernandez' termination package after she returned to her office at approximately 4 p.m. Hernandez was called to meet with Reed after he returned from his lunch break. Reed met with Hernandez just before 5 p.m. and he was informed of his termination. Reed explained that it was a common practice to discharge an employee towards the end of the workday. Hernandez testified that Reed, Peter Winchester, and Berry were at the meeting. Hernandez stated that the meeting was around 5 p.m. after his return from lunch (Tr. 231, 232). Hernandez' normal time for his lunch break was between 4 and 5 p.m. (Tr. 66). Hernandez stated the he was told by Reed that the employer lost trust in him as an employee and that the October 11 email was the final straw. Hernandez testified that he said very little at the termination meeting (Tr. 67, 68). Hernandez had recorded his termination meeting. The recording confirmed the testimony of Reed as to the reasons for the employer's loss of trust with him as an employee. In that same recording, Hernandez asked an unidentified female at the meeting if his termination was due to his "drive to organize." In response, he was asked "drive to organize what?" Hernandez replied, "unionization activity" and the female answered, "I have no idea about any of this" (R. Exh. 22B at p. 7).

Kelly Winchester, the vice-president of the laboratory, was informed by Berry of Hernandez' discharge on the following day. Winchester supervised over 100 lab workers. Winchester testified that Hernandez never approached her with any complaints of safety violations or inappropriate behavior in the lab (Tr. 315–317). Winchester was not involved in the decision to discharge Hernandez but agreed with the decision. Winchester recalled an incident when Hernandez used his supervisor's password in May to inappropriately access certain files. Winchester reported the incident to Berry and recommended his termination, but Hernandez was given a second chance by Berry (Tr. 318–320).[15]

d. The Respondent lacked knowledge of Hernandez' union support and solicitation at the time of his discharge

[15] Berry testified that felt that Hernandez was genuine in his apology and was quite contrite in using another employee's password to access confidential information. Berry was willing to give Hernandez another chance because his significant other was about to have a baby and Berry was sympathetic to his situation (Tr. 337–339). This may show Hernandez' lack of judgment, but it was not a factor for his discharge and not considered as relevant by me.

Reed denies any knowledge of Hernandez' support of the union or of his union organizing activity. Reed stated that she became aware only after receiving an email from Shivam Patel (Patel), a lab worker, who had sent her an email at 3:43 p.m. on October 11. Reed stated that she was away from her office and did not read the email until she returned just after 4 p.m. Reed also testified that just before she had returned to her office, a supervisor, Rachel Stanford, informed Reed that other employees told her that Hernandez was trying to get them to join a union. Reed replied, "no problem" and returned to her office when she then read the email from Patel (Tr. 237–240).

Patel stated in his email that he was approached by Hernandez and he tried to persuade him to start a union to protect themselves. According to Patel, Hernandez had asked him to sign a petition and to attend some future meetings. Patel did not state when he was approached by Hernandez. Patel stated, "I just kept saying ok so he would stop talking and I can get on with my work. . ." and that he wanted to remain anonymous (Jt. Exh. 4). Reed testified she forwarded the Patel email to Westfall at 4:15 p.m. on October 11(Jt. Exh. 11).

Berry recalled that there was a meeting with Reed and Westfall around 4:40 p.m. regarding the email that Reed received from Patel that Hernandez had solicited Patel to join a union. Berry testified that the meeting lasted about 5 minutes. Berry said no action was taken because it was a "moot point" since the decision to terminate Hernandez had already been made (Tr. 357–359, 368).

DISCUSSION AND ANALYSIS

The General Counsel contends that Respondent violated 8(a) (3) and (1) of the Act when it discharged Hernandez because of his union organizing efforts (GC Br.). The Respondent contends that it had no knowledge of Hernandez' protected activity prior to his discharge and that he was terminated for legitimate reasons (R. Br).

Section 7 of the Act provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . [Emphasis added]." Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

In *Meyers Industries (Meyers 1)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers 11*), 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action. *Whittaker Corp*., 289 NLRB 933 (1988); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). The object of inducing group action need not be express.

a. The Wright Line standard of review

The counsel for the General Counsel alleges that the Respondent discharge Hernandez for his union organizing activity in violation of Section 8(a)(3) and (1) of the Act. Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) by disciplining employees for antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where a discipline and discharge is alleged, the General Counsel has the burden to prove that the disciplinary action or discharge was motivated by employer antiunion animus.

Here, where the employer's motive for its action against an employee is alleged to be on account of the employee's union, concerted or protected activity, the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *Auto Nations, Inc.*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir 2015). Under *Wright Line*, the General Counsel has the burden of establishing that the employee's protected activity was a motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. *East End Bus Lines, Inc.*, 366 NLRB No. 180 (2018), slip op. at 1; see *Allstate Power Vac., Inc.*, 357 NLRB 344, 346 (2011), citing *Willamette Industries*, 341 NLRB 560, 562 (2004); see also *Austal USA, LLC*, 356 NLRB 363, 363 (2010).

Once the General Counsel makes that showing, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct." *East End Bus Lines, Inc.*, above, slip op. at 1; *Allstate Power Vac.*, above at 346 (quoting *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004); see also *Austal USA*, above at 364. To establish this affirmative defense, "An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007), quoting *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

Where the General Counsel makes a strong showing of discriminatory motivation, the employer's defense burden is substantial. *East End Bus Lines, Inc.*, above, slip op. at 1; see also *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010) (reversing judge and finding violation because judge "did not consider the strength of the General Counsel's case in finding that the Respondent met its *Wright Line* rebuttal burden"), enfd. 646 F.3d 929 (D.C. Cir. 2011); *NLRB v. CNN America, Inc.*, 865 F.3d 740, 759 (D.C. Cir. 2017).

b. The Respondent did not violate Section 8(a)(3) and (1) of the Act when it terminated the employment of Miguel Hernandez

In assessing credibility, I have considered factors such as: the context of the witness' testimony, the quality of the witness's recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions.

I find that the counsel for the Acting General Counsel failed his burden to establish that Hernandez' protected activity was a motivating factor for his discharge. Discriminatory motive of the adverse employment action taken may be established in several ways including through statements of animus directed to the employee or about the employee's protected activities, *Austal USA, LLC*, 356 NLRB 363, 363 (2010); the timing between discovery of the employee's protected activities and the discipline, *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless, *Lucky Cab Co.*, 360 NLRB 271 (2014); *ManorCare Health Services—Easton,* 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.,* 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088 fn. 12, *citing Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Initially, I find that Hernandez did not engaged in concerted activity protected by Section 7 of the Act.[16] As the record shows, Hernandez made numerous and repeated complaints and reports to the HR department on alleged safety violations and inappropriate behavior of his coworkers. These complaints were made to various HR personnel, including Berry, Reed, Westfall, and Totin. However, I find that no such object may be reasonably inferred from Hernandez' exchange with these individuals would warrant a finding that Hernandez engaged in concerted activity. Hernandez' meetings with the HR personnel were not for the "purpose" of "mutual aid or protection." Hernandez gripped to them about lab safety violations and the behavior of Tyler Rogers was more of his "venting" for his self-interest rather than for the "purpose" of "collective bargaining or other mutual aid or protection." However, even if the conversations could be deemed concerted, there is no evidence that the conversations had the "purpose" of fostering "collective bargaining or other mutual aid or protection."

In *Mushroom Transportation Co*., above, the court held that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of

[16] The counsel for the Acting General Counsel did not address whether Hernandez' reports and complaints about lab safety violations and the inappropriate behavior of Tyler Rogers might be a concerted activity for the mutual aid and protection of others (GC Br.). Nevertheless, I have considered this argument herein.

employees." The court added that "[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'" The standard set forth in *Meyers* remains the applicable test for determining when activity that "in its inception involves only a speaker and a listener" constitutes concerted activity. 281 NLRB at 887 (quoting *Root-Carlin, Inc.,* 92 NLRB 1313, 1314 (1951)). Under that standard, "'it must appear at the very least'" that such activity "'was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.'" Id. (quoting *Mushroom Transportation*, 330 F.2d at 685 (emphasis added)).

The conversations between Hernandez and the HR officials did not have the purpose of mutual aid or protection under *Fresh & Easy Neighborhood Market*, 361 NLRB 151 (2014), where a Board majority expansively interpreted Section 7's "mutual aid or protection" clause. In *Fresh & Easy*, a single employee was found to have a purpose of mutual aid or protection when she sought to have two coworkers sign a piece of paper (reproducing an obscene message scrawled on a whiteboard) relating to her individual complaint. In reliance on a "solidarity principle," the Board majority reasoned that a purpose of mutual aid or protection could be inferred because the employee was "soliciting assistance from coworkers." Id., at 156 (internal quotation omitted). Here, Hernandez was not soliciting assistance and mutual support from coworkers in his complaints about safety violations or about the actions of Tyler Rogers.

In finding that Hernandez did not engaged in concerted protected activity, I also find that the HR officials did not harbor any animus towards Hernandez and that Hernandez was not threatened with unspecified reprisal. The HR officials never told Hernandez to stop complaining. Indeed, Hernandez testified on his redirect examination that he was never ordered by the HR officials to stop complaining or to stop asking for meetings with them (Tr. 175, 176). The HR officials simply asked that he address the complaints to his lab supervisors and to focus on his job responsibilities instead of monitoring other employees. This, of course, made much more sense since reporting safety violations or the misconduct of coworkers would have been immediate and corrective actions taken on the spot by a supervisor rather than to wait several days or weeks to complain at a HR meeting.

The Board has established an objective test for determining if "the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara New-Press*, 357 NLRB 452, 476 (2011). The counsel for the General Counsel has not shown that any statements allegedly attributed to the HR officials, such as that they were tired of his complaints; of his continued insistence of a Monday work shift; and his demands to expunge his reprimand, would be considered as a threat with some unspecified reprisal against Hernandez in the future. No evidence or testimony was proffered by the counsel for the Acting General Counsel that any HR officials told Hernandez to stop complaining or that Hernandez be careful as to what he was saying about Rogers or other workers.

I find that the only protected activity under the Act occurred on October 11 when Hernandez solicited his coworkers' interest to organize the laboratory for collective bargaining or mutual aid and protection. Hernandez testified that he sought out his coworkers to survey

their interest in forming a union. Patel's email noted that he was approached by Hernandez to solicit his signature on a petition and whether he would be interested in attending meetings about the union (Jt. Exh. 4).

I find that his concerted activity, which may establish a discriminatory animus, turns on the timing of the protected activity and the discharge. Animus can be inferred from the relatively close timing between an employee's protected concerted activity and his discipline. *Corn Brothers, Inc*., 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co*., 337 NLRB 443, 451 (2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory motive).

Hernandez' October 11 email was the catalyst for the decision to terminate his employment. On the same day, Hernandez engaged in assessing the interest of his coworkers in forming a union. Here, the witnesses' credibility is determinative with regard to the timing as a factor of discriminatory motive.

Hernandez testified that he surveyed his coworkers in the afternoon on October 11 while he was on a lunch break, which he believed was after he sent out his email to Reed at 1:33 p.m. Hernandez' lunch break was between 4–5 p.m. Reed testified that upon receiving the email shortly after 1:33 p.m., she went to see Westfall. Reed, Berry, and Westfall consistently testified that the decision to terminate Hernandez occurred between 2 and 2:15 p.m. on October 11.

While the number of witnesses with consistent testimony is not determinative of whether they are more credible, I find credible that the HR officials' testimony is consistent with Hernandez' initial statement that his solicitation of coworkers occurred in the afternoon during his lunch break, which was between 4–5 p.m.. In subsequent testimony, Hernandez averred that his solicitation of his coworkers may have been during the morning of October 11, but he was not certain ("I don't know for sure.") (Tr. 119–120). In my opinion, Hernandez' testimony to place his union activity prior to the time of his email shows inconsistency and an attempt to rehabilitate his testimony. Hernandez' email did not mention any union solicitation activity, which would have reasonably been included in his email if he had in fact solicited employees prior to the time his email was sent to Reed. Additionally, I find that the single most objective evidence is the email from Patel, which places Reed's knowledge of Hernandez' solicitation of Patel shortly after 4 p.m. when she read his email that was sent at 3:43 p.m. Reed did not inform the others of that email until after 4:14 p.m. (Tr. 242; Jt. Exh. 5).[17] As such, I find it more credible than not that the Respondent's knowledge of Hernandez' protected activity occurred after the decision to terminate him was made during the 2–2:15 p.m. timeframe.

Without knowledge of Hernandez' protected activity, there can be no discriminatory animus taken on his termination. Hernandez' attempt to correct this deficiency was clear when he modified his position and testified that his solicitation of others could have been earlier than when he had sent the email. However, if that was true, the counsel for the Acting General

[17] Reed may have known about Hernandez' union activity slightly earlier around 4 p.m. when she was approached by Rachel Stanford and informed that Hernandez was trying to get employees to join a union, in which Reed replied, "no problem."

Counsel could have subpoenaed Hernandez' coworkers to provide testimony as to when they were approached by Hernandez. Bystander employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling them. *Torbitt & Castleman, Inc*., 320 NLRB 907, 910 fn. 6 (1996), affd. on point 123 F.3d 899, 907 (6th Cir. 1997). However, the judge may weigh the General Counsel's failure to call an identified, potentially corroborating bystander as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred. *C & S Distributors*, 321 NLRB 404 fn. 2 (1996), citing *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995); *Stabilus, Inc*., 355 NLRB 836, 840 fn. 19 (2010). In my opinion, the lack of corroborating testimony to place the solicitation earlier than the time of Hernandez' email squarely supports the Respondent's position that the solicitation of coworkers occurred after the decision to discharge Hernandez was made.

In sum, I find that Hernandez did not engage in concerted protected activity for the mutual aid and protection of other employees and that the Respondent had no knowledge of his union solicitation activity until after the decision to discharge was made. Assuming that the General Counsel met his *Wright Line* burden, I find that the employer would have taken the same adverse action absent Hernandez' protected activity. A Respondent is required to show it would have taken the same action for legitimate reasons even in the absence of the protected activity. *Monroe Mfg*., 323 NLRB 24, 27 (1997); *T&J Trucking Co*., 316 NLRB 771, 771 (1995), enfd. mem. 86 F.3d 1146 (1st Cir. 1996). If a respondent's stated motives "are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

The record shows that several employees have been terminated since 2018 for various reasons, such as performance, tardiness, and absenteeism (Jt. Exh. 13; 14). Hernandez was terminated of loss of trust. The Respondent's employee handbook (Jt. Exh. 12) defines loss of trust as

> LOSS OF TRUST
>
> Employees are expected to demonstrate good judgement and good intent at all times. It is crucial to our success that we trust each other to do the right thing, every time.
>
> The company reserves the right to discipline and/or dismiss an employee, with or without notice, in the event that his/her actions and/or a pattern of behavior have demonstrated a lack of good faith, lack of sound judgement, failure to observe the parameters of their position, and/or lack of sincere concern for the well-being of the Company, the job, their coworkers and/or our clients.

Here, while the loss of trust reason seems to be a "catch-all" for discharging an employee, there has been no evidence to establish that it was applied to Hernandez in a disparate manner or that it was pretextual. Reed, Berry, and Westfall cited numerous instances when Hernandez demonstrated a total disregard of what they had told him about his request for a schedule change; his constant reporting about Tyler Rogers and safety violations to the HR officials, and his insistence to continue to grip about a reprimand that was issued several months prior. The HR

officials' reasons for his discharge are consistent and unwavering. Hernandez complained that no investigation was conducted on his discipline. However, I find that there was a meaningful investigation conducted on his reprimand. The record shows that Louis Kopeck did submit a summary report of Hernandez' refusal to perform the extract (Jt. Exh. 1; R. Exh 6). Hernandez simply refused to accept his discipline. Hernandez asserted that he performed well in his job and testified to the glowing evaluations from his supervisors. As noted above, it was Hernandez who had sought meetings with his supervisors for his performance evaluation. There are no company records of the evaluations because they were not required.[18] In any event, Hernandez' ability to perform his job was not a factor for his discharge. Hernandez complained about not receiving a disability accommodation for a Monday work shift. The Respondent adequately explained there was no business justification to add another lab worker on a non-busy day. Hernandez was given the opportunity to apply for work shifts other than Mondays, which he declined. Hernandez reportedly was stressed from working alongside Tyler Rogers and sought the Monday work shift away from him. However, the undisputed record shows that Rogers actually had a Monday-Friday work shift at the time.

As such, there has been no deviation from past practices in implementing the discharge. There were no inconsistencies in the reason for the discharge. There was no disparity of treatment between Hernandez and other employees with similar work records or offenses. Indeed, Hernandez was favorably treated when he was not disciplined or discharged for using another employee's password to access confidential information on the computer.[19]

I find that discriminatory motivation cannot be reasonably inferred from the employer's action to discharge Hernandez. *WF. Bolin Co. v. NLRB,* 70 F. 3d 863, 871 (6th Cir. 1995). Accordingly, I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act when it discharged Miguel Hernandez on October 11, 2019, and I recommend that the complaint be dismissed in its entirety.

Dated: Washington, D.C. May 13, 2021

Kenneth W. Chu

[18] I would also note that Hernandez, who is apt to record conversations, did not audio record these meetings so there is no independent proof of his testimony as to his job performance.

[19] As noted, I did not consider Hernandez' lack of judgment in using a supervisor's password to access confidential computer data as a factor for his termination, but this event does show that Hernandez could have, but was not, disciplined. I also did not consider the alleged sexual harassment complaint for Hernandez' termination. The counsel for the Acting General Counsel objected to the introduction of such evidence and I allowed it for background information. However, as the Respondent never completed the investigation of the harassment complaint against Hernandez and no investigative findings were made, it would be inappropriate to consider the harassment complaint as a factor for his discharge (Tr. 207; R. Exh. 17).

Kenneth W. Chu
Administrative Law Judge